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In The

Supreme Court of the United States

BRIAN D. ROBINS,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Brian Robins is charged with attempting to violate Wisconsin's child enticement statute based on sexually explicit internet communications in which he arranged a sexual liaison with an adult police officer posing as a thirteen-year-old boy. No face-to-face meeting ever took place.

The child enticement statute does not require the state to prove scienter as to the age of the child.

1. Whether scienter as to the minority of the child-victim is constitutionally required where there is no face-to-face meeting between the accused and the alleged minor and the enticement consists entirely of internet communications that are protected under the First Amendment if between adults.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brian D. Robins respectfully requests that the Court issue a writ of certiorari to review the judgment of the Supreme Court of Wisconsin affirming the circuit court's denial of Robins' motion to dismiss on the grounds that Wisconsin's child enticement statute as applied to his internet communications violates the First Amendment.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court, *State v. Robins,* 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, is in Appendix A (App. A). The circuit court's unpublished written decision denying Robins' motion to dismiss is in Appendix B and its written order denying the motion is in Appendix C.

JURISDICTION

The Wisconsin Supreme Court entered judgment on June 21, 2002. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1257(a) & 2101(d) and Supreme Court Rule 13.1. As he did below, Mr. Robins asserts that Wisconsin's child enticement statute, as applied to his internet communications, violates the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the construction and application of the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

At issue is Wisconsin's child enticement statute, Wis. Stat. § 948.07:

948.07 Child enticement. Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

(2) Causing the child to engage in prostitution.

(3) Exposing a sex organ to the child or causing the child to expose a sex organ in violation of 948.10.

(4) Taking a picture or making an audio recording of the child engaging in sexually explicit conduct.

(5) Causing bodily or mental harm to the child.

(6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

STATEMENT OF THE CASE

By criminal complaint filed February 8, 2000, the state charged Brian Robins with one count of child enticement, contrary to Wis. Stat. §948.07(1). Following the preliminary hearing on March 31, 2000, the state filed an Information charging Robins with the single count of child enticement as well as five counts of attempting to transfer harmful materials to a child. These five counts later were dismissed by the circuit court and are not at issue. The material facts, as disclosed in the criminal complaint and at the preliminary hearing, are as follows.

From January 31 through February 5, 2000, Agent Thomas Fassbender of the Wisconsin Department of Justice, Division of Criminal Investigation, had a series of sexually explicit internet instant message conversations with a person using the screen name "Wi4Kink." During these conversations Fassbender, who was 42 years old at the time, used the screen name "Benjm13" and represented himself as a thirteen-year-old boy. Benjm13 and Wi4Kink discussed oral sex, past sexual experiences, masturbation, ejaculation, and penis size. Wi4Kink also transmitted sexually explicit photos to Benjm13.

Ultimately, Wi4Kink suggested that the two get a motel room together the following weekend to engage in sexual conduct. Following that conversation, there were additional internet communications in which Fassbender suggested meeting at a Burger King in Little Chute,

Wisconsin, which is where Benjm13 said he lived. On the morning of February 5, final arrangements for the meeting at Burger King were made during a telephone conversation. Another officer, Officer Ray Lee, posed as Benjm13 for this telephone conversation.

Having determined through America On Line that the screen name Wi4Kink was assigned to Brian Robins, the police set up surveillance at his Wauwatosa home on February 5. Shortly after the telephone conversation with Lee, officers observed Robins drive from his home to the Burger King in Little Chute. When Robins exited his car and began walking toward the restaurant, he was arrested by Fassbender. Following his arrest, Robins admitted that he had been the person communicating on the internet with Benjm13, that he did drive to the Burger King to meet Ben, that Ben had told him he was thirteen, and that his intent was to have sexual contact with Ben.

Fassbender testified that he had no knowledge of Mr. Robins or Wi4Kink having any sexually explicit conversations with any minor at any time during the course of the investigation. Fassbender acknowledged that it is not uncommon for people to make misrepresentations regarding age on the internet and that people frequently present themselves as something they are not on the internet.

Based on these facts, Robins was bound over for trial. Robins filed pretrial motions challenging the criminal complaint, the sufficiency of the preliminary hearing evidence, and the constitutionality of Wisconsin's child enticement statute, Wis. Stat. §948.07.

Robins asserted that the child enticement statute, at least as applied to anonymous internet communications, unconstitutionally infringes upon First Amendment rights

because it does not require the state to prove that the defendant knew that the person with whom he was communicating was a child. In situations where there is no personal meeting between the two, such as over the internet, there is no effective way to verify the age and the identity of the other person. Thus, Robins argued, the child enticement statute impermissibly forces adults to choose between not exercising their First Amendment rights or risking violation of the statute if it turns out that the person on the other end of the internet conversation is a minor.

The circuit court denied each of Robins' motions. The circuit court's decision finding Wis. Stat. §948.07 constitutional is contained in Appendix B.

Robins then filed a petition for leave to appeal the circuit court's non-final orders, which the Wisconsin Court of Appeals granted. The Wisconsin Supreme Court then granted Robins' Petition to Bypass, agreeing to hear all of Robins' challenges to the prosecution.

The Wisconsin Supreme Court affirmed. *State v. Robins*, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287 (App. A; App. 1-22). That Court held that the child enticement statute does not regulate speech or expression, either on its face or as applied to child enticements initiated over the internet. *Robins*, 2002 WI 65, ¶41; App. 19. Consequently, the Court concluded that the First Amendment was not implicated by the application of the statute. "Simply put, the First Amendment does not protect child enticements, whether initiated over the internet or otherwise." *Id.*, 2002 WI 65, ¶44; App. 21.

This petition requests review only of that portion of the Wisconsin Supreme court's decision finding the child

enticement statute constitutional as applied to Mr. Robins' alleged conduct.

REASONS FOR ALLOWANCE OF THE WRIT

I. *Robins* Cannot Be Reconciled With *X-Citement Video*, Which Dictates That Proof Of Scienter As To A Child's Age Is Constitutionally Required Where Age Is The Crucial Element Separating Legal Innocence From Wrongful Conduct And The Defendant's Alleged Unlawful Acts Consist Of Internet Communications That Are Protected By The First Amendment If Between Adults.

Robins' alleged acts of enticement consisted of sexually explicit conversations designed to persuade the recipient of his internet communications to meet for a sexual liaison. Such communications constitute protected speech if between adults, provided the conversations are not obscene. E.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Sable Communications of Cal., Inc. v. F.C.C.* 492 U.S. 115, 126 (1989). Given that the age of the recipient of the enticing communications is the crucial element separating legal innocence from wrongful conduct under the child enticement statute, the question is whether proof of scienter as to age is constitutionally required under the First Amendment where there is no face-to-face contact between the accused and the child. Wisconsin's child enticement statute does not require the State to "prove the defendant's knowledge of the child's minority and the defendant cannot assert mistake as the child's minority as a defense. . . ." *Robins*, 2002 WI 65, ¶33; App. 15. *See also* Wis. Stat. §939.23(6) ("[c]riminal

intent does not require proof of knowledge of the age of a minor"); Wis. Stat. §939.43(2) ("A mistake as to the age of a minor . . . is not a defense").

In *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), this Court reversed the Ninth Circuit's decision finding 18 U.S.C. §2252, which prohibits the distribution, shipping or receipt of child pornography, unconstitutional for failing to require proof of knowledge of the minority of the performers. Although recognizing that "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts," this Court eliminated those constitutional doubts by construing §2252 to include an element of scienter as to age. *Id.*, 513 U.S. at 78. The Court relied heavily on the common law presumption that a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct. *Id.* at 72-73. Under §2252 age of minority "indisputably" possesses the same status as an elemental fact because the First Amendment protects non-obscene sexually explicit materials not involving children. *Id.* at 72.

X-Citement Video strongly suggests that scienter as to age is constitutionally required in prosecutions relating to the sexual exploitation of children because "the age of the performers is the crucial element separating legal innocence from wrongful conduct." *Id.* at 73. The scienter requirement protects the reasonable expectation created by prior decisions of this Court that citizens will be free "from regulation when trafficking in sexually explicit, though not obscene, materials involving adults." *Id.*

X-Citement Video, however, also noted an exception to the presumption of scienter where there is personal contact with the child. In *Morissette v. United States*, 342

U.S. 246, 251 n.8 (1952), the Court identified an exception to the common-law presumption of *mens rea* in "'sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached the age of consent.'" *X-Citement Video*, 513 U.S. at 72 n.2 (quoting *Morissette*). That exception is warranted because "as in the criminalization of pornography production . . . , the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age." *X-Citement Video*, 513 U.S. at 72 n.2. Accordingly, it is reasonable to place the "risk of error" as to age on persons producing pornography or engaging in sexual contact because those persons have a practical opportunity through a personal meeting to verify identity and age. *Id.* at 72 n.2, 76 n.5. Thus, whether scienter as to age is constitutionally required likely turns on the accused's ability to effectively verify age.

Historically, child enticement would fall within the exception to the *mens rea* requirement that applies to sex offenses. When the Wisconsin legislature first enacted the statute, it undoubtedly envisioned cases such as an adult trying to lure a child into a car with a piece of candy. In those cases, it is reasonable to place the "risk of error" regarding age on the perpetrator. Persons meeting on the internet to arrange sexual liaisons do not, however, have an opportunity to verify the age and identity of the person being enticed. The reality is that there is no practical and reliable means of determining the age of another person met through an internet chat room. *See Reno*, 521 U.S. at 855, 876. Chat room participants frequently assume pseudonyms and misrepresent their identities, and they can lie about their age with no particular risk that the

truth will be revealed. Thus, the rationale supporting strict liability as to age in child sex offenses no longer is persuasive when applied to internet communications where there is no opportunity to reliably verify age.

Because the child enticement statute does not require the state to prove that the defendant knew the person he enticed was a minor, the statute ensnares adults who arrange consensual sexual encounters over the internet erroneously believing that they are communicating with an adult. Absent face-to-face contact, the statute goes too far by forcing persons to act at their own peril if they choose to use the internet to arrange a sexual encounter. Given the severity of the penalties associated with child enticement, up to thirty years incarceration, many will forego their right to engage in protected speech with adults because of the risk of mistakenly communicating with a child.

In two cases the Wisconsin Supreme Court relied on *X-Citement Video* to find statutes unconstitutional as applied to the internet because they contained no scienter requirement as to age. In *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, Weidner sent sexually explicit and nude photos over the internet to a sixteen-year-old girl who had told Weidner that she was under eighteen. Weidner never communicated with the girl except through the internet and they did not have any face-to-face contact. Weidner was charged with disseminating harmful materials to minors, contrary to Wis. Stat. §948.11. The Wisconsin Supreme Court found the harmful to minors statute unconstitutional as applied to the internet and other situations where there is no face-to-face contact between the defendant and the child. *Weidner* explained that "[b]ecause age represents the critical

element separating illegal conduct from that which remains protected, to avert significant constitutional dilemmas some form of scienter must be implied in a statute imposing criminal liability based on age." *Weidner*, 2000 WI 52, ¶11.

In *State v. Zarnke*, 224 Wis. 2d 116, 589 N.W.2d 370 (1999), the court found Wis. Stat. §948.05, which prohibits the sexual exploitation of a child, unconstitutional as applied to the internet because it does not require proof that the distributor of sexually explicit materials knew the person depicted in the materials was a minor. *Id.*, 589 N.W.2d at 371-72. *Zarnke* holds that the defendant's knowledge of minority is an essential element of the offense, as a constitutional matter, in cases where there is no personal meeting between the accused and the child victim. *Id.* at 374-376.

Petitioner submits that *Weidner* and *Zarnke* correctly applied *X-Citement Video*. In *Robins*, however, the Wisconsin Supreme Court evaded the issue of scienter by erroneously holding that the child enticement statute does not implicate the First Amendment because it regulates conduct, rather than speech. The opinion ignores that all of Robins' alleged acts of enticement were expressive in nature. Robins' "speech," his internet communications and telephone call, are the basis for the charge of attempted child enticement. Not a single act of enticement in which he engaged, either alone or in combination with his other acts, is a crime with an adult. This "as applied" challenge addresses whether the enforcement of the statute in this particular case implicates the freedom of expression, not whether the offense may be committed in other ways that do not implicate First Amendment concerns. In determining whether Robins' actions constitute

speech or conduct, the question is "whether [Robins'] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . ." *Spence v. Washington*, 418 U.S. 405, 409 (1974). The Wisconsin Supreme Court erroneously considered the statute on its face rather than as applied to the specific conduct alleged against Robins and as a result erred in finding that this case does not implicate the First Amendment.

Robins' sexually explicit internet communications with a person he never met, in which he arranged to meet that person to have sexual contact, are lawful, constitutionally protected communications if between adults. He does not claim, as suggested by the Wisconsin Supreme Court's opinion, that child enticements are protected by the First Amendment. *Robins*, 2002 WI 65, ¶44; App. 21. Rather he asserts that these internet communications cannot be criminalized unless the statute requires proof that the enticing communications were *knowingly* directed to a child. Because Wisconsin's child enticement statute does not require proof of knowledge, the statute is unconstitutional as applied. The Wisconsin Supreme Court's decision conflicts with *X-Citement Video* and therefore certiorari is appropriate.

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Wisconsin Supreme Court.

Dated at Milwaukee, Wisconsin, September 19, 2002.

Respectfully submitted,

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APPENDIX A

2002 WI 65

NOTICE
This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 00-2841-CR
(L.C. No. 00 CF 53)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,
Plaintiff-Respondent,
v.
Brian D. Robins,
Defendant-Appellant.

(Filed Jun. 21, 2002)

APPEAL from an order of the Circuit Court for Outagamie County, Michael W. Gage, Circuit Court Judge. *Affirmed and cause remanded.*

¶1 DIANE S. SYKES, J. This is a prosecution for attempted child enticement arising out of an internet "sting" operation by the Department of Justice (DOJ). The primary issue is whether the child enticement statute is violated when there is no actual child victim, but, rather, an adult government agent posing online as a child. The defendant also challenges the sufficiency of the allegations in the complaint and the evidence at the preliminary hearing. Finally, the defendant raises a First Amendment

challenge to the statute as applied to child enticements initiated over the internet.

¶2 The defendant raised these issues in various motions to dismiss in the Outagamie County Circuit Court. The Honorable Michael W. Gage denied the motions, and the court of appeals granted interlocutory appeal. We accepted the defendant's petition to bypass, and now affirm.

¶3 We conclude that an attempted child enticement under Wis. Stat. § 948.07 (1999-2000)[1] may be charged where the intervening extraneous factor that makes the offense an attempted rather than completed crime is the fact that unbeknownst to the defendant, the "victim" is not a child at all, but an adult posing as a child. We further conclude that the allegations in the complaint and the evidence at the preliminary hearing were sufficient to establish probable cause in this case. Finally, because the child enticement statute regulates conduct rather than speech or expression, the First Amendment is not implicated by this prosecution.

I

¶4 The defendant Brian Robins was charged with attempted child enticement contrary to Wis. Stat. § 948.07(1), stemming from a DOJ internet "sting"

[1] All future references to the Wisconsin Statutes will be to the 1999-2000 version of the statutes unless otherwise indicated.

operation.[2] Beginning on January 31, 2000, Robins, using the screen name "WI4Kink," had a series of online conversations with "Benjm13," initially in an internet chat room known as "Wisconsin M4M." [3] Unbeknownst to Robins, "Benjm13" was Thomas Fassbender, a 42-year-old DOJ agent posing online as a 13-year-old boy named Benjamin living in Little Chute, Wisconsin.

¶5 The subject of "Benjamin's" age came up within the first 12 minutes of the first online conversation between Robins and "Benjm13." "Benjamin" told Robins that he was 13 years old.[4] The initial and subsequent online conversations and e-mails between Robins and "Benjm13" centered on explicit sexual matters (including, among other things, oral sex, masturbation, ejaculation, and penis size), and were recorded by Fassbender.[5]

¶6 Robins, who was 46 years old and lived in Wauwatosa at the time of the offense, suggested that the two meet:

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[2] The facts are from the criminal complaint and the preliminary hearing transcript, and are taken as true for purposes of resolving the legal issues on this review.

[3] Testimony at the preliminary hearing showed that "M4M" meant either Male For Male or Men For Men.

[4] Benjm13: ru my age

Benjm13: im 13

WI4kink: no older

[5] Fassbender testified at the preliminary hearing that the DOJ runs a computer program called Power Tools that automatically logs conversation and instant message or chat room conversations and saves these communications. The agent then saves the communications to a disk and prints them off as paper copies.

WI4kink: So you ever get to Milwaukee?

Benjm13: sometimes withmy [sic] mom

WI4kink: cool so how would we ever meet?

Benjm13: i dont know u can come here if u want

WI4kink: ya that is true

WI4kink: you have a place we could go?

Benjm13: just my house but thats scary

WI4kink: ya it would be, specially [sic] if someone comes home:)

Benjm13: wow not cool

WI4kink: no

Benjm13: i dont know were [sic] to go

WI4kink: could just get a room somewhere

Benjm13: oh that would be cool – like a motel

WI4kink: yup

¶7 Robins acknowledged that what he was proposing to do was illegal:

Benjm13: im getting nervus [sic] already

WI4kink: ok I understand well I am a little to [sic] this isn't legal you know

Benjm13: i geus [sic] so

¶8 The second online conversation between Robins and "Benjamin" took place the next evening, February 1, 2000. Again it involved mostly sexual topics, and Robins was persistent in setting up a meeting between the two on

the following Saturday. The conversation makes clear that Robins was planning to find a motel room:

> WI4kink: what time of the day would be best?
>
> . . .
>
> Benjm13: after i get up would be ok
>
> WI4kink: as far as getting a room that should be like early afternoon

¶9 Robins also asked "Benjamin" for his telephone number. "Benjamin" appeared to be reluctant to give it to him. After Robins assured "Benjamin" that he would only use the number to call on Saturday to confirm their meeting, "Benjamin" replied, "ok."

¶10 On February 2 and 3, Robins and "Benjamin" "missed" each other online, and instead exchanged e-mail messages. In one e-mail, "Benjamin" informed Robins that he had directions to Little Chute and that they could probably meet at the Burger King just off the highway. Robins e-mailed "Benjamin" and asked him to send the directions. He also told "Benjamin" that he was "still a little nervous" because he "would not want to get scammed." "Benjamin" sent the directions, together with the message, "i'm a little scared to [sic]. u have to promise me not to tell anyone and to be nice ok. my mom would kill me." In another e-mail, Robins advised that he would arrive in Little Chute around noon, but that "Benjamin" should give Robins his telephone number so that Robins could call on Saturday morning with an exact time. Robins closed the e-mail by saying: "I know we must be very carefull. [sic] I am looking forward to it."

¶11 On Friday, February 4, 2000, Robins and "Benjamin" met online and engaged in another instant message

conversation. This conversation confirmed that the two would meet the following day for the purpose of having sex. Robins expressed his hope that "Benjamin" was "saving" himself for the following day (that is, he hoped "Benjamin" would not masturbate before their meeting) and that he (Robins) was "getting hard just talking to" him ("Benjamin"). Robins again asked Benjamin for his telephone number because Robins "want[ed] to make sure that ["Benjamin" was] serious." Because "Benjamin" appeared to be nervous about Robins calling his house, they decided to meet online again in the morning before Robins made the telephone call.[6]

¶12 At a little after 10 a.m. on Saturday, February 5, 2000, Robins and "Benjamin" met online for the fourth and final time. "Benjamin" said he was "exited [sic] about goin to a motel." Robins replied that it "should be hot." "Benjamin" gave Robins his telephone number and they both signed off the internet.

¶13 Soon after they signed off, Robins called the number "Benjamin" – Fassbender – had given him. Officer Ray Lee of the Fox Valley Metro Police Department posed as "Benjamin" during the telephone conversation. The

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[6] During the course of the internet correspondence between Robins and "Benjamin," Robins sent four photo file attachments to the "Benjm13" e-mail address. One was a photo of Robins fully clothed. Another purported to be a photo of Robins' penis. The other two photos depicted naked young men masturbating. These e-mails were the subject of additional charges for attempted distribution of harmful materials to a child, contrary to Wis. Stat. §§ 948.11(2)(a) and 939.32(1). These charges were later dismissed on the State's motion, pursuant to this court's decision in *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684.

conversation was recorded and Fassbender testified at the preliminary hearing that the content of the telephone conversation consisted mainly of setting the final arrangements for the meeting – what Robins would be wearing, what kind of car Robins would be driving, what "Benjamin" would be wearing and what he looked like. Fassbender testified that "Mr. Robins said, we'll have to find a motel when I get up there, something to that effect."

¶14 In the meantime, Fassbender had determined through America Online that the screen name "WI4kink" belonged to Robins. The DOJ set up surveillance outside Robins' home in Wauwautosa. Shortly after Robins' telephone conversation with "Benjamin" on Saturday, February 5, 2000, Robins left his house. He was surveilled from his home to the Burger King in Little Chute. Robins parked in the Burger King parking lot, got out of his car, and was arrested as he walked towards the restaurant.

¶15 Robins admitted in a statement to police that he had met "Benjm13" in an internet chat room, that "Benjm13" told Robins that he was a 13-year-old boy, that they'd had sexually explicit conversations, and that Robins had e-mailed sexually explicit materials to "Benjm13". Robins further admitted that he had set up the meeting with "Benjm13" for the purpose of having sex with him. Robins also stated that he had told "Benjm13" that they would go to a motel room for that purpose.

¶16 Just before the preliminary hearing, Robins filed a motion to dismiss the complaint for lack of probable cause. Because of the short notice, the motion was not immediately decided. The preliminary hearing was held, and the State's motion for bindover was granted, over Robins' objection.

¶17 Following arraignment, Robins moved to dismiss, alleging insufficient evidence to support the bindover. He also challenged the constitutionality of Wis. Stat. § 948.07 as applied to child enticements initiated over the internet.

¶18 The circuit court denied the motions, finding sufficient evidence to establish probable cause and rejecting Robins' constitutional attack on the statute. The circuit court was not persuaded by Robins' argument that the statute as applied here impermissibly infringed First Amendment rights. The circuit court held that the child enticement statute "does not ban expression, but a particular type of conduct involving children that may or may not flow from protected speech."

¶19 Robins petitioned the court of appeals for leave to appeal the circuit court's non-final orders, which the court of appeals granted. Robins then petitioned this court for permission to bypass the court of appeals. The State joined in the request, citing the substantial number of pending child enticement prosecutions involving internet "sting" operations in which government agents pose online as children. We granted bypass.

II

¶20 The applicability of the child enticement statute to an internet "sting" operation that involves an adult undercover officer posing online as a child is a question of law that we review de novo. *State v. Jensen,* 2000 WI 84, ¶12, 236 Wis. 2d 521, 613 N.W.2d 170. The sufficiency of the allegations in the complaint is also a question of law that we review independently, as is the defendant's challenge to the legal sufficiency of the evidence at the preliminary hearing. *In re A.S.,* 2001 WI 48, ¶26, 243 Wis. 2d

173, 626 N.W.2d 712; *State v. Williams,* 104 Wis. 2d 15, 21, 310 N.W.2d 601 (1981). In addition, the constitutionality of a statute is determined without deference to the lower courts. *State v. Johnson,* 2001 WI 52, ¶10, 243 Wis. 2d 365, 627 N.W.2d 455.

III

¶21 Robins claims that he is being prosecuted for a non-existent crime. He characterizes the charge against him as an "attempt to attempt a crime," or an "attempt to commit a strict liability crime," neither of which, he says, is recognized under Wisconsin law. Alternatively, he argues that because there was no actual child victim, the crime of child enticement was legally impossible and the charge must be dismissed.

¶22 Arguments like these have already been specifically rejected by the court of appeals, and rightly so. In *State v. Koenck,* 2001 WI App 93, 242 Wis. 2d 693, 626 N.W.2d 359, the court of appeals was confronted with a factual scenario almost identical to the one presented here. Koenck, using the screen name "dirtboy69," engaged in sexually explicit internet conversations with "Teddie" and "Georgie," who told "dirtboy69" during these online encounters that they were 11-year-old twin sisters. In reality, "Teddie" and "Georgie" were fictional online profiles created by Nancy A.C., a 46-year-old Pennsylvania woman who founded a group known as Internetwatch, an organization that monitors the internet, mainly for purveyors of child pornography.

¶23 Eventually, Koenck, who lived in Iowa, made arrangements online to meet "Teddie" and "Georgie" in Brookfield, Wisconsin, for the purpose of having sexual

intercourse. He rented a hotel room and arranged to meet "Teddie" and "Georgie" at a McDonald's restaurant in Brookfield. The Wisconsin DOJ was contacted, and the defendant was arrested when he arrived at the designated meeting place.

¶24 Koenck, like Robins, was charged with attempted child enticement contrary to Wis. Stat. § 948.07(1). Like Robins, he promptly moved to dismiss, claiming that the statute required an actual child victim. The court of appeals disagreed.

¶25 The court of appeals first noted that the child enticement statute encompasses the completed act of enticement as well as its attempt:

> **948.07 Child enticement**. Whoever, *with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place* is guilty of a Class BC felony:
>
> (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or s. 948.095.
>
> (2) Causing the child to engage in prostitution.
>
> (3) Exposing a sex organ to the child or causing the child to expose a sex organ in violation of 948.10.
>
> (4) Taking a picture or making an audio recording of the child engaging in sexually explicit conduct.
>
> (5) Causing bodily or mental harm to the child.

> (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Wis. Stat. § 948.07 (emphasis added); *Koenck,* 2001 WI App 93, ¶9. *See also State v. Derango,* 2000 WI 89, ¶¶17-19, 236 Wis. 2d 721, 734, 613 N.W.2d 833 (holding that the act of enticement, or attempted enticement, with intent to commit one or more of the enumerated underlying offenses, is the gravamen of the crime, rather than the underlying offense itself).

¶26 The court of appeals in *Koenck* noted that when attempted child enticement is charged, the pattern jury instructions call for the addition of the legal definition of "attempt." *Koenck,* 2001 WI App 93, ¶17; *see* Wis JI – Criminal 2134, n. 3. An attempt is defined in the statutes as follows:

> An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

Wis. Stat. § 939.32(3).

¶27 The court of appeals viewed the fact that Koenck's "victims" were fictitious as the "extraneous factor" that intervened to make Koenck's crime an attempted rather than completed act of child enticement:

> Within the contemplation of Wis. Stat. § 948.07, an attempt is complete when the

> defendant, with intent to commit a crime, takes action in furtherance of such intent and the failure to accomplish the crime is due to a factor beyond his or her control or one unknown to him or her. . . . We conclude that the fictitiousness of the girls constituted an extraneous factor beyond Koenck's control that prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact. . . . Koenck did everything necessary to insure the commission of the crime intended, and his conduct is not excused because of the fortuitous circumstance rendering it impossible to effectuate the intended result. . . .

Koenck, 2001 WI App 93, ¶28 (citations omitted). The court of appeals concluded that the absence of an actual child victim constituted "an extraneous factor beyond Koenck's control that prevented successful enticement while not excusing the attempt to entice." *Id.* at ¶29.

¶28 The court of appeals' interpretation of the child enticement statute in *Koenck* was entirely correct, and we reject Robins' argument that the case should be overruled. Here, as in *Koenck,* the extraneous factor that intervened to make the crime an attempted rather than completed child enticement is the fact that "Benjm13" was an adult government agent rather than a 13-year-old boy. That there may be or could have been other intervening factors does not make this an impermissible prosecution for an "attempt to attempt a crime."

¶29 Nor is it an impermissible prosecution for an "attempt to commit a strict liability offense," as Robins contends. He cites *State v. Briggs,* 218 Wis. 2d 61, 66, 579 N.W.2d 783 (Ct. App. 1998), in which the court of appeals held that "attempted felony murder" is not a recognized

crime. The court noted that "under Wisconsin law, one cannot attempt to commit a crime which does not itself include an element of specific intent." *Id.* at 66. The court concluded that because felony murder does not include an intent element, one cannot "attempt" a felony murder. *Id.*

¶30 In contrast to felony murder, however, the crime of child enticement *does* contain a mens rea or specific intent element. The child enticement statute is not violated unless the perpetrator committed or attempted the act of enticement with one or more of the specific enumerated prohibited intents, most of which involve sex crimes against children. *See Derango,* 2000 WI 89, ¶¶17, 20, and 31. Child enticement is a strict liability offense only in the sense that the State need not prove the defendant's knowledge of the child's minority and the defendant cannot use mistake as to the child's minority as a defense. *See* Wis. Stat. § 939.43(2) ("[a] mistake as to the age of a minor . . . is not a defense"); *see also* Wis. Stat. § 939.23(6) ("[c]riminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime"). Accordingly, attempted child enticement is not an "attempt to commit a strict liability crime," impermissible under the rationale of *Briggs.*

¶31 Finally, Robins' assertion of the "legal impossibility" defense is foreclosed by the court of appeals' decision in *State v. Kordas,* 191 Wis. 2d 124, 528 N.W.2d 483 (Ct. App. 1995). There, the defendant was charged with attempt to receive stolen property. The charge arose out of an undercover operation in which the police made certain modifications to a Harley Davidson motorcycle to make it appear as though it was stolen, and passed it off as stolen to the defendant, who allegedly bought it with that understanding and intent. *Id.* at 126. Because the motorcycle

was *not* stolen, however, the defendant argued that it was legally impossible for him to have committed the crime of attempt to receive stolen property; the circuit court agreed, and dismissed the complaint. *Id.*

¶32 The court of appeals reversed, holding that legal impossibility is not a defense to the crime of attempt:

> [A] defense of legal impossibility is no defense to an *attempt* to commit a crime, absent the defendant's "mistake." Section 939.43(1), STATS., defines the defense of "mistake":
>
> > An honest error, whether of fact or of law other than the criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.
>
> (Emphasis added.) Therefore, a fact of which a defendant has no knowledge, such as the fact that an apparently stolen motorcycle is *not* stolen, cannot form the basis for the defense of mistake. As the supreme court explained, "[s]ound public policy" supports the view that:
>
> > impossibility not apparent to the actor should not absolve him from the offense of attempt to commit the crime he intended. . . . In so far as the actor knows, he has done everything necessary to insure the commission of the crime intended, and he should not escape punishment because of the fortuitous circumstance that by reason of some fact unknown to him it was impossible to effectuate the intended result.
>
> *State v. Damms,* 9 Wis. 2d 183, 190-91, 100 N.W.2d 592, 596 (1960) (impossibility for defendant to commit murder because gun was not

> loaded did not preclude conviction for *attempted* murder where defendant intended to kill and believed gun was loaded).

Id. at 129-30.

¶33 *Kordas* controls here. Robins tries to distinguish it by reverting to his argument that child enticement is a strict liability offense, making the defendant's state of mind about the age of the victim irrelevant and the rationale of *Kordas* inapplicable. But the defendant's state of mind is *not* irrelevant in a child enticement prosecution. Indeed, as we have noted above, the State must prove that the defendant possessed one or more of the prohibited intents itemized in the statute (here, intent to commit a second-degree sexual assault of a child) before it can convict on either a completed or attempted child enticement. That the State need not prove the defendant's knowledge of the child's minority and the defendant cannot assert mistake as to the child's minority as a defense does not take this statute outside the holding of *Kordas.*[7]

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[7] Robins also claims *State v. Smith,* 202 Wis. 2d 21, 549 N.W.2d 232 (1996) requires dismissal of the charge against him. *Smith* involved a charge of second-degree sexual assault (by use or threat of force) of a 16-year-old girl. Pursuant to plea negotiations, the defendant entered an *Alford*-plea to a reduced charge of child enticement contrary to Wis. Stat. § 948.07(1). *Id.* at 23-24. This court reversed. Child enticement under Wis. Stat. § 948.07(1) is predicated on intent to commit a first- or second-degree sexual assault of a child, which requires the victim to be under 13 and 16 years of age, respectively. *See* Wis. Stat. § 948.02(1) and (2). Since the victim was 16 years old, the defendant could not legally be convicted of child enticement under that subsection of the statute. *Id.* at 28. *Smith,* however, concerned a conviction for a

(Continued on following page)

¶34 We conclude, then, pursuant to *Koenck* and *Kordas,* that the crime of attempted child enticement contrary to Wis. Stat. § 948.07 may be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement is the fact that, unbeknownst to the defendant, the "child" is fictitious.

IV

¶35 Robins also claims the allegations in the criminal complaint and the evidence adduced at the preliminary hearing are insufficient to establish probable cause. At most, he says, the evidence establishes "mere preparation" to commit a crime or "an appointment" with a potential victim, neither of which is legally sufficient to support a probable cause finding.

¶36 We have held that the crime of attempt has two elements: "(1) an intent to commit the crime charged; and (2) sufficient acts in furtherance of the criminal intent to demonstrate unequivocally that it was improbable the accused would desist from the crime of his or her own free will." *State v. Stewart,* 143 Wis. 2d 28, 34, 420 N.W.2d 44 (1988). While it is unquestionably true that "[t]he law does not ordinarily punish a person for guilty intentions alone," the law of attempt does not punish guilty intentions but "acts that further the criminal objective." *Id.* at 37.

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completed act of child enticement, not an attempted child enticement. Accordingly, *Smith* has no application here.

¶37 The crime of attempt is complete when the intent to commit the underlying crime is coupled with sufficient acts to demonstrate the improbability of free will desistance; the actual intervention of an extraneous factor is not a "third element" of the crime of attempt, although it is often part of the proof. *See id.* at 39-42, *see also, Hamiel v. State,* 92 Wis. 2d 656, 662-68, 285 N.W.2d 639 (1979). There is no statutory defense of voluntary abandonment once an attempt is completed, and this court has declined to create such a defense at common law. *Stewart,* 143 Wis. 2d at 45-46.

¶38 The allegations in the complaint and the evidence elicited at the preliminary hearing are more than sufficient to establish probable cause for the crime of attempted child enticement under the test articulated in *Stewart*. The complaint and preliminary hearing establish that the defendant engaged in sexually-explicit online "chats" and e-mails with a person he thought was a 13-year-old boy, for the express purpose of illegally soliciting that boy for sex; that he arranged a meeting time and place to effectuate that purpose; and that he traveled to and arrived at the agreed-upon meeting place, where he was arrested. These allegations easily establish probable cause to believe that Robins attempted the crime of felony child enticement; that is, that he possessed the intent to entice a child for sexual intercourse and that he engaged in unequivocal acts in furtherance of that criminal objective such that it was improbable that he would desist of his own free will.

V

¶39 Finally, Robins raises a First Amendment[8] challenge to Wis. Stat. § 948.07 as applied to child enticements initiated over the internet, citing our decisions in *State v. Weidner,* 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684, and *State v. Zarnke,* 224 Wis. 2d 116, 589 N.W.2d 370 (1999). Both *Weidner* and *Zarnke,* however, involved First Amendment challenges to variable obscenity statutes, and their holdings are therefore inapplicable here.

¶40 In *Weidner,* the defendant challenged Wis. Stat. § 948.11(2), which prohibits the transfer, sale or exhibition of harmful (generally, sexually explicit) material to a child, as applied to internet transfers of sexually explicit material. *Weidner,* 2000 WI 52, ¶¶8-9. In *Zarnke,* the defendant challenged Wis. Stat. § 948.05, which generally prohibits the sale or distribution of child pornography. *Zarnke,* 224 Wis. 2d at 121-22. Both statutes imposed a form of strict liability, in that the State was not required to prove the defendant's knowledge of the victim's age. *Weidner,* 2000 WI 52, ¶12; *Zarnke,* 224 Wis. 2d at 123-24. Because the distribution of non-obscene, sexually explicit material to adults and the distribution of non-obscene, sexually

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[8] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Although Robins does not assert a separate state constitutional claim, we note that Article I, section 3 of the Wisconsin Constitution also provides a fundamental right to freedom of speech: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. . . ."

explicit material depicting adults are protected by the First Amendment, this court held that the lack of a knowledge requirement as to the victim's age rendered the statutes unconstitutional under the First Amendment. *Weidner,* 2000 WI 52, ¶37; *Zarnke,* 224 Wis. 2d at 132-33.

¶41 In contrast to the statutes invalidated in *Weidner* and *Zarnke,* the child enticement statute at issue here is not a variable obscenity statute, nor does it regulate speech or expression, either on its face or as applied to child enticements initiated over the internet. The United States Supreme Court has rejected the contention that the First Amendment extends to speech that is incidental to or part of a course of criminal conduct. *Giboney v. Empire Storage,* 336 U.S. 490, 498 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.").

¶42 It is not "an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502 (citing *Fox v. Washington,* 236 U.S. 273, 277 (1915), and *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942)).[9] Given today's technology, we would add electronic language to this list.

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[9] *See also State v. Mitchell,* 169 Wis. 2d 153, 181, 485 N.W.2d 807 (1992), (Abrahamson, J., dissenting) *rev'd by Wisconsin v. Mitchell,* 508 U.S. 476 (1993) ("Bigots are free to think and express themselves as they wish, except that they may not engage in criminal conduct in furtherance of their beliefs.").

¶43 The child enticement statute regulates conduct, not speech.[10] The statute protects against the social evil and grave threat presented by those who lure or attempt to lure children into secluded places, away from the protection of the general public, for illicit sexual or other improper purposes. *Derango,* 2000 WI 89, ¶¶17-19. That an act of child enticement is initiated or carried out in part by means of language does not make the child enticement statute susceptible of First Amendment scrutiny.[11]

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[10] *City of Madison v. Schultz,* 98 Wis. 2d 188, 295 N.W.2d 798 (Ct. App. 1980) provides an example of the distinction between speech and conduct in a First Amendment challenge. There, the court of appeals held that First Amendment rights were not implicated by an ordinance that prohibited naked genital massage in commercial massage establishments. The court said: "We agree with the United States Supreme Court's statement in *United States v. O'Brien,* 391 U.S. 367, 376 (1968), that '[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea.' The only idea expressed by the masseuse was her willingness to take her clothes off to enhance the sexual experience of the paying patron. . . . [A] masseuse's actions in disrobing do not constitute 'speech' which the first amendment protects." *City of Madison v. Schultz,* 98 Wis. 2d at 203.

[11] *See, e.g., Mitchell,* 169 Wis. 2d at 189 (Bablitch, J., dissenting):

> However, if words are used to prove the crime, the words uttered are not the subject of the statutory prohibition; rather, they are used only as circumstantial evidence to prove the intentional selection. Permitting the use of such evidence does not chill free speech . . . words of defendants are frequently used to prove the element of intent in many crimes without violating the First Amendment . . . It is no more a chilling of free speech to allow words to prove the act of intentional selection [an element of the crime] in this "intentional selection" statute than it is to allow a defendant's words that he "hated John Smith and wished he were dead" to prove a defendant intentionally murdered John Smith.

¶44 Robins' internet conversations and e-mails with "Benjm13" do not by themselves constitute the crime of child enticement. Rather, Robins' internet conversation and e-mails are circumstantial evidence of his intent to entice a child, which, combined with his actions in furtherance of that intent, constitute probable cause for the crime of attempted child enticement. That some of the proof in this case consists of internet "speech" does not mean that this prosecution, or another like it, implicates First Amendment rights. Simply put, the First Amendment does not protect child enticements, whether initiated over the internet or otherwise.[12]

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[12] For examples of cases which come to a similar conclusion, see *United States v. Bailey,* 228 F.3d 637, 639 (6th Cir. 2000) ("Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sex acts"); *United States v. Powell,* 1 F.Supp.2d 1419, 1422 (N.D. Ala. 1998) ("[t]he court finds it difficult to ascertain how the First Amendment is violated by a law that prohibits an individual from attempting to knowingly persuade, induce, and entice a person under eighteen years of age to engage in an illegal sexual act."); *New York v. Foley,* 721 N.E.2d 123, 132 (N.Y. 2000) ("courts have recognized that speech used to further the sexual exploitation of children does not enjoy constitutional protection"). *See also United States v. DeBeir,* 186 F.3d 561 (4th Cir.1999) (upholding the defendant's conviction under a comparable federal statute, 18 U.S.C.A. § 2423(b), in a fact scenario similar to that presented here); *United States v. Farner,* 251 F.3d 510 (5th Cir.2001) (upholding the defendant's conviction under 18 U.S.C.A. 2422(b) for attempting to entice a minor to engage in criminal sexual acts when the "minor" was an adult undercover agent); *Thibeault v. Florida,* 732 So. 2d 28 (Fla. Dist. Ct. App. 1999) (upholding the defendant's conviction for attempted child enticement via the internet when the minor child was an adult deputy sheriff posing as a minor child); *Hudson v. Florida,* 745 So. 2d 997 (Fla. Dist. Ct. App. 1999) (affirming the conviction of a defendant who attempted child enticement by writing letters to a "child" who was actually an adult law enforcement officer); *Illinois v. Patterson,* 734

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¶45 Accordingly, we conclude that the offense of attempted child enticement under Wis. Stat. § 948.07 may be charged where the intervening extraneous factor that makes the offense an attempted rather than completed crime is the fact that unbeknownst to the defendant, the "victim" is not an actual child, but, rather, an adult government agent posing as a child. We also conclude that the allegations in the complaint and the evidence adduced at the preliminary hearing are sufficient to establish probable cause in that they establish, to the requisite degree, that Robins intended to commit the crime of child enticement and would have done so but for the intervention of an extraneous factor. Finally, we conclude that the First Amendment is not implicated by the application of the child enticement statute to child enticements initiated over the internet, because the statute regulates conduct, not speech. Therefore, we affirm the circuit court's order denying the defendant's motions to dismiss, and remand for further proceedings.

By the Court.–The order of the Outagamie County Circuit Court is affirmed and cause remanded.

N.E.2d 462 (Ill. App. Ct. 2000) (affirming the conviction of a defendant who attempted to induce a child into sexual acts using the internet when the child was an adult detective); *Attorney Grievance Commission of Maryland v. Childress,* 770 A.2d 685 (Md. 2001) (suspending indefinitely the law license of an attorney who engaged in acts which equated to enticement of a child via the internet, where the "child" was an FBI agent); *In re Harlow,* 280 A.D.2d 870 (N.Y. App. Div. 2001) (disbarring an attorney after he was convicted of enticing an actual child over the internet); *Chen v. Texas,* 42 S.W.3d 926 (Tex. Crim. App. 2001) (affirming the defendant's conviction for attempted child enticement using the internet when the child was an undercover officer).

APPENDIX B

STATE OF WISCONSIN	CIRCUIT COURT BRANCH V	OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case No. 00 CF 53

v.

BRIAN D. ROBINS,

Defendant.

DECISION ON MOTION TO DISMISS COUNT 1 AND ORDER

Defendant is charged with one count (Count 1) of attempted child enticement with the intent to have sexual contact, contrary to §948.07(1), Wis. Stats. He was also charged with five counts (Counts 2-6) of attempted transfer of harmful material to a child, contrary to §§948.11(2)(a) and 939.32(1). Counts 2 through 6 have been dismissed. The defendant moves to dismiss Count 1, on the grounds that §948.07 is unconstitutional when the offense does not involve any face-to-face contact between the defendant and the child.

I

Material facts for motion purposes are disclosed in the Complaint and preliminary hearing record. They are taken as established for motion purposes.

Special Agent Fassbender, Wisconsin Department of Justice, Division of Criminal Investigation, acting in an undercover capacity, communicated with the defendant via the Internet. Fassbender used the screen name of "Benjm13" and the defendant used the screen name of "Wi4Kink." On January 31, 2000, the defendant made contact with Special Agent Fassbender in his undercover capacity as "Benjm13" and engaged him in a sexual discussion. He asked "Benjm13" his age and Fassbender responded that he was 13.

The Internet discussion between the two pertained to oral sex, masturbation and other sexual matters. The defendant suggested that he and "Benjm13" meet so that they could rent a motel room for the purpose of engaging in sexual activity. He stated that his name was Brian and that he knew that this activity was not legal. On February 1, 2000, the defendant again contacted "Benjm13" and provided a photograph of himself, as well as pornographic photographs, via the Internet to "Benjm13." He again suggested that the two of them meet on the weekend, discussing the location of their meeting and that he did not want "Benjm13's" mother to know about it.

On February 4, there was further communication between the defendant and "Benjm13" in which they discussed the potential meeting, as well as sexual matters. On February 5, they again discussed the meeting, which involved renting a room in which they would spend time together, and agreed that there would be a telephone communication between the two to make the final arrangements. Special Agent Fassbender arranged for the telephone conversation to be conducted between Officer Ray Lee posing as "Benjm13" and the defendant. During the telephone conversation, the defendant stated that he

would be traveling to the Burger King restaurant in Little Chute, Outagamie County, Wisconsin to meet with "Benjm13."

Surveillance conducted at the defendant's residence in Wauwatosa indicates that shortly after his telephone conversation with "Benjm13," he was observed leaving his residence and traveling to the Burger King restaurant in Little Chute on May 5, 2000. Previously, defendant had e-mailed a photograph of himself to "Benjm13" and advised that he drove a white Acura automobile and would be wearing a brown jacket. At approximately 12:23 p.m. on May 5, the defendant entered the Burger King parking lot in Little Chute, parked his vehicle and walked toward the restaurant where he was to meet "Benjm13." He was then arrested by Special Agent Fassbender.

II

The defendant seeks dismissal of Count 1, attempted child enticement with the intent to have sexual contact, arguing that §948.07, Wis. Stats., is unconstitutional in cases which do not involve any face-to-face contact between the defendant and the alleged victim because it violates First Amendment rights of expression and association. The state is required to show that the defendant had reason to believe he was communicating with a minor to show the defendant's intent. Defendant contends that the knowledge of age requirement renders §948.07 unconstitutional as applied here, because of the difficulties in effectively verifying the age and identity of persons in Internet communications. Assertedly, this chills expression and association rights protected by the First Amendment by forcing Internet users to choose between foregoing

communications of a sexual nature or risking a violation of the statute. Defendant points out that while it is generally or historically reasonable to place the burden on the defendant to ascertain the other person's age before causing or attempting to cause the person to enter a room with the intent to have sexual contact; it is unreasonable to do so when there is no personal meeting between the parties, or at least when the only "meeting" is by non-pictorial or by written Internet messages and telephone.

In support of his position, the defendant cites *State v. Zarnke*, 224 Wis. 2d 116, 589 N.W.2d 370 (1999) and *State v. Weidner*, 235 Wis. 2d 306, 611 N.W.2d 684 (2000). In *Zarnke*, the Supreme Court held that Wis. Stat. §948.05, prohibiting the sexual exploitation of a child, is unconstitutional because it does not require the State to prove that a distributor of sexually explicit materials had knowledge of the minority of the person depicted in the materials. Section 948.05 prohibits, among other things, the reproduction and/or distribution of photographs, electronically stored images, and other pictoral reproductions of a child engaging in sexually explicit conduct. It provides an affirmative defense, allocating to the defendant the burden to prove lack of knowledge of the minority of the person depicted in the materials. The Supreme Court held the pertinent statute unconstitutional as it applies to the distribution of sexually explicit material depicting minors, as well as to the other prohibited conduct which does not entail a personal interaction between the accused and the victim.

In *Weidner*, the Supreme Court held Wis. Stat. §948.11(2), which prohibits the dissemination of harmful material to minors, unconstitutional in the context of the Internet and other situations that do not involve face-to-

face contact between the minor and the accused. The Court determined that the statute impermissibly shifts to the defendant the burden of proving knowledge of the victim's age and infringes on protected First Amendment expression. Under §948.11(2), like §948.05, lack of knowledge of the juvenile's minority stands as an affirmative defense that the defendant must prove to avoid criminal liability.

The State in turn contends that the instant case is distinguishable from *Weidner* and *Zarnke* because the statute involved here, §948.07, by its terms, proscribes conduct – and not speech. In addition, unlike the statutes in *Weidner* and *Zarnke*, proof of age is not an affirmative defense under §948.07 and thus there is no shifting of the burden of proof on that element to the defendant. The State contends thus that there is no First Amendment right implicated in §948.07. Consistent with this position, the State argues that the focus of §948.07 is the defendant's intent to commit a crime with a child and his actions taken in furtherance of separating the child from the presence or view of others to commit one of the enumerated crimes against a child.

The State contends that the focus in *Weidner* is the statute's lack of a scienter element regarding the age of the person receiving the materials and that age is the critical element separating illegal conduct from legal conduct. Here, on the other hand, the critical element is said to be the defendant's intent – along with acts which further that intent. The State further contends that the crimes in *Weidner* and *Zarnke*, providing harmful materials to a child and distribution of child pornography, can be committed entirely by actions constituting expression or speech. On the other hand, a violation of §948.07 involves

some elements of speech with regard to evidence of intent, but the crime itself involves the non-speech actions of taking affirmative steps to physically get a child into a secluded location. The State contends that since §948.07 requires speech plus action, it is not subject to the same First Amendment scrutiny.

III

Statutes generally enjoy a presumption of constitutionality. In most circumstances, those challenging the constitutionality of a statute have the burden to prove that the statute is unconstitutional beyond a reasonable doubt. *State v. Zarnke*, 224 Wis. 2d 116, 124, 589 N.W.2d 370 (1999). However, when a statute infringes on rights afforded by the First Amendment, the State carries the burden of proving the statute constitutional. *State v. Weidner*, 235 Wis.2d 306, 312, 611 N.W.2d 684 (2000).

The child enticement statute, section 948.07 provides in relevant part:

> **948.07 Child enticement.** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:
>
> **(1)** Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

Since speech or expression constitutes the crime itself in §§948.05 and 948.11(2), the First Amendment is clearly implicated. However, the crime of attempted child enticement entails conduct coupled with a particular purpose – not speech. Written communication via the Internet, and a

phone call, is relevant to show intent when there is no face-to-face contact between the defendant and a child victim; but that does not transform child enticement into a speech-based crime. Child enticement requires that: 1) the defendant caused or attempted to cause the child to go into a secluded place; 2) the defendant did this for the purpose of engaging in illegal sexual conduct; and 3) the child has not attained 18 years of age. It is the Court's conclusion that First Amendment free speech rights are not implicated, or implicated only incidently.

The statutes at issue in *Weidner* and *Zarnke* provide an affirmative defense which requires the defendant to prove his lack of knowledge of the victim's minority status. The defendant must prove reasonable cause to believe that the victim has attained 18 years of age and that the victim exhibited some "official or apparently official" document to verify the victim's age. Section 948.07 does not provide such an affirmative defense. The State bears the burden of proof as to all of the elements of the offense; specifically, the State carries the burden of proof with regard to the potential victim's age.

Section 948.07 requires that the defendant had the intent to commit a crime with a child, that he believed that he was dealing with a child, and that he engaged in conduct supportive of that intent. *Zarnke* involved the distribution of sexually explicit materials depicting minors; the Court found §948.05 unconstitutional with respect to distributors who never had any direct contact with the child and, therefore, there was virtually no possibility to establish the affirmative defense. In *Weidner*, which involved exposing a child to harmful material, the Court found §948.11 unconstitutional with regard to Internet contact which did not entail face-to-face

contact: therefore, it was impossible for the defendants, as Internet users, to meet the burden imposed by the affirmative defense. Here, there is no affirmative defense regarding the age of the child under any circumstances.

The statutes at issue in *Zarnke* and *Weidner* ban certain types of expression involving children – §948.05 prohibits sexual exploitation of a child and §948.11 prohibits exposing a child to harmful material. In the instant case, §948.07 does not ban expression, but a particular type of conduct involving children that may or may not flow from protected speech. Unlike those statutes, there is no shifting burden on proof of age by way of affirmative defense: the State must prove every element, including that the defendant reasonably believed that he was communicating with a child under the age of 16. Circumstantial evidence, other than face-to-face contact, may give rise to an inference concerning age. Written e-mail messages certainly can be circumstantial evidence. Multiple communications including a phone call, on various occasions, in various contexts, may provide indicia of minority status of an adolescent – just as a picture or a face-to-face meeting might. In any event, the expression over the Internet and telephone involved here is not a violation of §948.07, unless it is acted upon in attempting to cause the child to enter a secluded place for an illegal sexual purpose.

The decisions in *Zarnke* and *Weidner* are inapposite because the statutes involved in those cases do explicitly ban certain types of expression with respect to minors. Further, §948.07 does not provide an affirmative defense requiring the defendant to prove lack of knowledge about minority status. Therefore, this Court finds that §948.07 is constitutional as applied to the facts of this case. The

defendant's Motion to Dismiss Count 1 is hereby ordered DENIED.

Dated at Appleton, Wisconsin this 8th day of September, 2000.

BY THE COURT:

/s/ Michael Gage
HONORABLE MICHAEL W. GAGE
CIRCUIT COURT JUDGE,
BRANCH V
OUTAGAMIE COUNTY

Distribution:
ADA M. Cathleen Huber
Attorney Craig W. Albee

APPENDIX C

STATE OF WISCONSIN	: CIRCUIT COURT :	OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case No. 00-CF-53

v.

BRIAN D. ROBINS,

Defendant.

ORDER

For the reasons stated in this Court's decision on Motion to Dismiss Count 1 filed September 8, 2000.

IT IS HEREBY ORDERED that the defendant's Motion to Dismiss Count 1: Unconstitutionality of Wis. Stat. §948.07 is denied.

Dated at Appleton, Wisconsin, this 29 day of September, 2000.

BY THE COURT:

/s/ Michael Gage
Honorable Michael W. Gage